

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 739 of 1985

with

CRIMINAL REVISION APPLICATION No 260 of 1985

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

HARSHADRAY CHHAGANLAL KHATRI & ORS.

Appearance:

1. Criminal Appeal No. 739 of 1985
MR S.R.DIVETIA, APP, for the Appellant-State.
MR B.K.DAVE, for MR VIVEK BAROT for the respondents
2. Criminal Revision Application No. 260 of 1985.

MR S.R.DIVETIA, for the Petitioner
MR R.K.DAVE, for MR VIVEK BAROT for the Respondents.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI
Date of decision: 19/07/96

COMMON ORAL JUDGEMENT (per KADRI, J.)

Appellant - State of Gujarat, has filed this appeal under S.378 of the Code of Criminal Procedure, 1973, challenging the legality, validity of the judgment and order dated March 29, 1985, rendered by the learned Addl. Sessions Judge, Ahmedabad (Rural) at Narol, in Sessions Case No. 36 of 1985, whereby the Respondents who were charged for the offences punishable under Ss.302 read with s.34 of the I.P.Code, and also under Ss.325, 323 read with S.34 of the I.P.Code and Respondent No.2 who was further charged for the offence punishable under S.504 of the I.P.Code, were, at the end of the trial, came to be acquitted. The prosecution case in brief, is as under :

2. Complainant Bhavnaben, was residing with her late husband and children in Khatrivad at Viramgam. On the day of the incident, i.e. on 5.11.1984 at about 10.30 p.m., she had gone with her husband and children to her mother-in-law's house. Her husband - deceased Kamlesh, had gone out in the bazar, to chew pan. While he was returning to his house, accused no. 1, 2 and 3 attacked him with sticks, and gave fatal blows as a result of which the deceased sustained serious injuries and fell down. It is alleged that when the deceased had fallen down, accused no.3 gave kick blows on the face of the deceased. It is further the prosecution case that Kishore, brother-in-law of complainant Bhavnaben had tried to rescue his brother deceased Kamlesh, and in that attempt he also sustained injury due to stick blows. It is also alleged that witness Chamanlal Kamabhai and his wife Savitaben Chamanbhai had also come to the rescue of the deceased, but they also sustained injuries due to sticks blows inflicted on them by accused nos. 1, 2 and 4. As deceased had sustained serious injuries, he was at first taken in a hand-larri to Viramgam Hospital. There he was examined by Dr.Kiritbhai Jayantilal Patel. As his condition was found to be serious, he was shifted to Civil Hospital, Ahmedabad where he succumbed to the injuries on 7.11.1984. In the Viramgam Hospital,

alongwith the deceased, accused no. 1 and 2 were also examined as they had also sustained injuries in the incident. Meanwhile, complainant Bhavnaben had lodged complaint against the four accused at the Viramgam Police Station. PSI Mr.Arvinbhai Muljibhai Patel carried out the investigation and submitted charge-sheet against the four respondents-accused in the court of the learned JMFC at Viramgam. As the offences mentioned in the charge-sheet were exclusively triable by the Court of Sessions, the case came to be committed to the Sessions Court, Ahmedabad (Rural) at Narol, which was numbered as Sessions Case no. 36 of 1985.

3. Charge Ex.1 was framed against the accused to which they pleaded not guilty and claimed to be tried. The defence of accused no. 1 and 2 was that the deceased, his brother Kishore, witness Chamanbhai and others had attacked them with sticks, but accused no.2 had snatched away the stick from the brother of the deceased, viz. Kishore and had wielded it to save himself and accused no.1, and therefore, the deceased, his brother Kishore, witness Chamanbhai and his wife Savitaben might have sustained injuries. Accused no.3 and 4 stated that they were falsely involved in the case.

4. To bring home the charge against the accused, the prosecution examined the following witnesses :

- (i) PW 1 Ex. 10 Dr.Kamlesh Shantilal Shah,
- (ii) PW 2 Ex. 27 Dr.Yogendra D.Shah,
- (iii) PW 3 Ex. 30 Dr.Vinodchandra K.Acharya,
- (iv) PW 4 Ex. 33 Bhagwandas Laxmanbhai,
- (v) PW 5 Ex. 36 Chamanbhai Kamabhai
(injured witness)
- (vi) PW 6 Ex. 37 Savitaben Chamanbhai,
(injured witness)
- (vii) PW 7 Ex. 38 Kishorekumar Kantilal,(injured
witness-brother of the deceased)
- (viii) PW 8 Ex. 39 Habibbhai Musabhai,
- (ix) PW 9 Ex. 42 Kadarbhai Musabhai,
- (x) PW 10 Ex. 46 Dr.Kiritbhai Jayantilal Patel,

(xi) PW 11 Ex. 55 Bhavnaben Kamleshbhai
(Complainant - wife of deceased
Kamlesh Kantilal)

(xii) PW 12 Ex. 56 Police Head Constable
Naranrao G.Chaudhari,

(xiii) PW 13 Ex. 58 Police Head Constable,
Babulal Jivaji,

(xiv) PW 14 Ex. 59 PSI Arvindbhai M. Patel.

5. The prosecution also relied on documentary evidence such as post-mortem notes, panchnama of the scene of offence, injury certificates as regards witnesses Chamanbhai Kamabhai, Kishorekumar Kantilal, etc. to prove its case against the respondents.

6. After recording of the evidence of the prosecution witnesses was over, the learned Judge recorded statements of the accused under S. 313 of the Code of Criminal Procedure, 1973. In their statements, the respondents stated that the case against them was false, but did not lead any evidence in defence.

7. The learned Judge, on appreciation of evidence, recorded the following conclusions :

- (a) The prosecution has proved that deceased Kamlesh died homicidal death because of the injuries sustained by him in the incident;
- (b) The prosecution has failed to prove that the accused had shared the common intention to cause death of deceased Kamlesh.
- (c) The evidence of complainant Bhavnaben is quite contradictory to the complaint lodged by her before police; and her evidence is unnatural because she claimed to be an eye-witness to the incident, but in her complaint, she stated that she arrived at the scene of incident after the deceased had fallen down; and therefore her evidence is not free from doubt and no reliance can be placed on that evidence more particularly when she tried to rope in original accused no.3 falsely though nothing was attributed to original accused no.3 in the complaint.
- (d) The evidence of Kishore Kantilal, PW 7 Ex.38, the brother of of the deceased is also quite

contradictory as compared to his police statement because this witness deposed that accused no.3 was simply speaking abusive language, whereas according to the prosecution case, accused no.3 had given kick blows on the body of the deceased and the witness also did not refer to any stick blow given by accused no.4 during his evidence before the court;

- (e) Witness Kishore, even though, claims to be an eye-witness to the incident, did not offer any explanation for the injuries sustained by accused no. 1 and 2 during the course of the incident which indicates that prosecution has supported genesis of the occurrence;
- (f) Injured witness Savitaben, PW 6, Ex. 37 is not a truthful witness as she had only come out of her house alongwith her husband, on hearing the hue and cry, i.e. after the incident was over;
- (g) Admittedly three months prior to the date of the incident, chapter cases were filed by the accused and the deceased, against each other and therefore, the accused and the deceased were on inimical terms and because of enmity, accused no. 3 and 4 were wrongly implicated in this case;
- (h) The prosecution has utterly failed to prove that accused no.3 had given kick blows on the person of the deceased as the prosecution's own witnesses did not support this theory of giving kick blows to the deceased by accused no.3.
- (i) There is material contradiction between the evidence of Kishorekumar Kantilal, PW 7 Ex. 38, and complainant Bhavnaben, PW 11, Ex. 55 and also the evidence of eye-witness Chamanlal Kamabhai, PW 5, Ex. 36 regarding stick blows given by accused no.4 and therefore, it is not proved that accused no.4 had given stick blows either to deceased or to injured witnesses;
- (j) The evidence on record proves that the incident had taken place near the shop of accused no.1, and not at the place as suggested by the prosecution witnesses which probabilises the defence of the accused that the deceased, his brother Kishore, witness Chamanbhai and others had attacked accused no. 1 and 2 with lathis and during this attack, accused no. 1 and 2 had sustained injuries;

- (k) The injury certificates of accused no.1 and 2 show that they had sustained serious injuries during the course of the incident for which the prosecution witnesses have not given an explanation and therefore, the genesis of the prosecution case is doubtful;
- (l) The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses, or where the defence gives a version which competes in probability with that of the prosecution one.
- (m) Prosecution witnesses no.7 Kishorekumar Kantilal and no.11 Bhavnaben Kamleshbhai are closely related to the deceased whereas prosecution witnesses no. 5 Chamanlal Kamabhai, and no.6 Savitaben Chamanbhai are respectively the friend and friend's wife of the deceased, and are on inimical terms with the accused and thus, prosecution has not led any independent evidence against accused;

8. In view of the above referred to conclusions, the learned Judge acquitted the respondents by the impugned judgment, giving rise to the present appeal.

9. We have heard Mr.S.R.Divetia, ld.APP and Mr.B.K. Dave, ld.Advocate for the Respondents. Mr.Divetia has taken us through the evidence of all the material witnesses and the documents relied upon by the prosecution at the trial. We have carefully perused the evidence produced by the prosecution at the trial. We are of the opinion that no interference is called for to disturb the just and proper conclusions arrived at by the learned Sessions Judge while acquitting the accused. We entirely agree with the reasons given by the learned Judge in the impugned judgment. The learned Judge has rightly discarded the prosecution version with regard to the manner in which the incident is fabricated by the prosecution witnesses. The learned Judge has rightly doubted the genesis of the prosecution case, as the injured eye-witnesses who were present during the course of the incident could not offer any explanation with regard to the serious injuries sustained by accused no. 1 and 2 during the course of the incident. It is pertinent to note that the map of the place of incident Ex.35 and the panchnama of the scene of offence Ex.15 also show that the incident had taken place near the shop of accused no.1. Outside the shop of the accused, the motor cycle of accused no.1 was found lying in a damaged condition, which is

established by the above map and the panchnama. This indicates that the deceased and other persons had, first in point of time, attacked the accused and given stick blows to accused no.1 and 2. Accused no. 1 and 2 in their further statements recorded under S.313 of the Code of Criminal Procedure also stated that the deceased, his brother Kishore, witness Chamanlal Kamabhai and other persons had attacked them with lathis and had given stick blows to accused no.1 and 2 but accused no.2 had snatched away the stick from witness Kishore and wielded it, which resulted in causing injuries to the deceased, his brother Kishore and witness Chamanlal Kamabhai. It is also pertinent to note that the prosecution has claimed that in the incident, the accused had caused injury to the wife of Chamanlal Kamabhai, viz. Savitaben Chamanlal. But in support of the so called injury no medical certificate was produced, nor she was examined by any Doctor. This fact also creates doubt in the mind of the court that the prosecution has tried to implicate innocent persons in the incident. In our opinion, accused no. 3 and 4 are falsely involved in this case. As the witnesses of the prosecution have not offered any explanation with regard to the injuries caused to accused No.1 and 2, the genesis of the prosecution case becomes doubtful, and the benefit of the doubt must go to the accused. Complainant Bhavnaben, who claims to have witnessed the incident, had in fact not witnessed it, and she arrived at the place of the incident after the deceased had fallen down. All the eye-witnesses are not telling the truth before the court, and their evidence is contradictory to their police statements. In our opinion, the learned Sessions Judge has rightly disbelieved their evidence and ultimately acquitted the accused.

10. This is an acquittal appeal in which court should be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI & ORS. vs. BIJENDRA NARAIN CHAUDHARY, AIR

1967 SC 1124, and (2) STATE OF KARNATAKA vs. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent and the learned Addl. Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

11. For the foregoing reasons, we do not see any merits in the appeal. The appeal therefore fails and is dismissed. Muddamal articles are ordered to be disposed of in terms of the directions given by the learned trial Judge in the impugned judgment.

CRIMINAL REVISION APPLICATION NO. 260 OF 1985.

This Criminal Revision Application filed by the original complainant, challenging the judgment and order dated March 29, 1985 passed by the learned Addl. Sessions Judge, Ahmedabad (Rural) at Narol, in Sessions Case No. 36 of 1985, also deserves to be dismissed in view of our decision in Criminal Appeal No. 739 of 1985. The Criminal Revision Application stands disposed of accordingly.

abraham*